United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2432

74-2432

To be Argued by
A. Seth Greenwald

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ALICE G. AVRUTICK,

Plaintiff,

and MELVIN ASCENCIO, et al.,

Plaintiff-Appellee,

-against-

MALCOLM WILSON, individually and as Governor of the State of New York, et al.,

Defendants-Appellants,

SALVATORE SCLAFINI, et al.,

Defendants.

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BRIEF FOR DEFENDANTS-APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ALICE G. AVRUTICK,

Plaintiff,

and MELVIN ASCENCIO, on behalf of each other and on behalf of all others similarly situated; namely, those persons newly arrived in New York State who are precluded from enrolling in the political party of their choice by the operation of Section 186 of New York's Election Law,

Plaintiff-Appellee,

-against-

MALCOLM WILSON, individually and as Governor of the State of New York; JOHN P. LOMENZO, individually and as Secretary of State of New York;

Defendants-Appellants,

SALVATORE SCLAFINI, individually and as President, New York City Board of Elections; HERBERT FEUER, individually, and as Secretary, New York City Board of Elections; ALICE SACHS; ANTHONY SADOWSKI, ELRICH EASTMAN, JOSEPH PREVITI, STANLEY KOCHMAN, ELIZABETH CASSIDY, CHARLES AVARELLO and GUMERSINDO MARTINEZ, individually and in their respective capacities, as Members of the New York City Board of Elections, ALBERT HAYDUK and WILLIAM VAN WORT, Commissioners of Election for Westchester County,

Defendants.

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BRIEF FOR APPELLEES WILSON, LOMENZO AND ATTORNEY GENERAL, PRO SE IN DEFENSE OF CONSTITUTIONALITY

Questions Presented

1. Is Election Law (N.Y.) § 186 a durational residency requirement as to voting in a primary?

2. Is Election Law (N.Y.) § 186 really involved in this appeal?

(a) Is Election Law § 187(6) involved and is it constitutional?

Statement

This is an appeal of a judgment of the Southern District of New York (Owen, DJ.) granting plaintiff-appellee Asencio a declaratory judgment. This declared Election Law (N.Y.) § 186 unconstitutional as applied to a United States citizen from Puerto Rico, who arrived in New York after the preceding general election.

The Attorney General appeared herein primarily in his capacity to defend the constitutionality of a state statute. Executive Law (N.Y.) § 71.

Facts

The instant appeal involves only plaintiff Asencio, as Ms. Avrutick was enrolled specially, Election Law § 187(2) and no longer presented any complaint at the time of the decision below. As to Mr. Asencio, he was formerly a resident of Puerto Rico, a self-governing Commonwealth within the United States. On January 24, 1974 he moved to New York State; specifically Bronx County. On March 15, 1974 he registered to vote there. His enrollment, allegedly in the Democratic Party, was deferred pursuant to Election Law (N.Y.) § 186, as it occurred after the preceding general election. The effect was that he would not be able to vote in the September 1974 primary.

Plaintiff Asencio urged that § 186 was unconstitutional as applied to him.

Opinion Below

As the complaint did not seek injunctive relief, the single district judge considered the plaintiff's motion for summary judgment. It was granted.

Assuming that Election Law § 186 was a durational residency requirement, Judge Owen applied the "compelling state interest" test found in Dunn v. Blumstein, 405 U.S. 330

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* Numbers in parentheses refer to Joint Appendix.

(1972) and declared § 186 unconstitutional. He found there was no substantial risk a voter from another state would be "raiding" a primary.*

Class action relief was denied.

Statutes Involved

New York Election Law

> "§ 186. Opening of enrollment box and completion of enrollment. All enrollment blanks contained in the enrollment box shall remain in such box, and the box shall not be opened nor shall any of the blanks be removed therefrom until the Tuesday following the day of general election in that year."

> "§ 187. Application for special enrollment, transfer or correction of enrollment. 1. At any time after January first and before the thirtieth day preceding the next fall primary, except during the thirty days preceding a spring primary, and except on the day of a primary, a voter may enroll with a party, transfer his enrollment after moving within a county, and under certain circumstances, correct his enrollment, as hereinafter in this section provided.
>
> "2. A voter may enroll with a party if he did not enroll on the day of the annual enrollment (a) because he became of age after the preceding general election, or (b) because he was naturalized subsequent to ninety days prior to the preceding general

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* Note that in Ortner v. Board of Elections, infra p. 9, a three-judge case, which upheld the validity of § 186, Judge Owen was a dissenting judge and his opinion here reiterates his view in Ortner.

election, or (c) because he did not have the necessary residential qualifications as provided by section one hundred fifty, to enable him to enroll in the preceding year, or (d) because of being or having been at all previous times for enrollment a member of the armed forces of the United States as defined in section three hundred three, or (e) because of being the spouse, child or parent of such member of the armed forces and being absent from his or her county of residence at all previous times for enrollment by reason of accompanying or being with such member of the armed forces, or (f) because he was an inmate or patient of a veterans' bureau hospital located outside the state of New York at all previous times for enrollment, or the spouse, parents or child of such inmate or patient accompanying or being with such inmate or patient at such times, or (g) because he was incapacitated by illness during the previous enrollment period thereby preventing him from enrolling."

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"6. Special enrollment under the classification set forth in clause (c) of subdivision two is hereby expressly limited to a voter otherwise qualified, who did not have the qualifications to vote at the previous general election and such special enrollment is restricted to the same county the voter resided in at the preceding year."

POINT I

ELECTION LAW § 186 IS CONSTITUTIONAL. IT IS NOT A DURATIONAL RESIDENCY REQUIREMENT. IT IS A LEGITIMATE REGULATION OF THE PARTY SYSTEM.

In light of the comprehensive decision in Rosario v. Rockefeller, 410 U.S. 752 (1973) there can be no doubt that Election Law § 186 is constitutional. The Supreme Court held that the State "is certainly justified in imposing some reasonable cutoff point for registration or party enrollment, which citizens must meet in order to participate in the next election". Id. at 760. The prevention of party raiding, or preservation of the integrity of the electoral process is a "legitimate and valid state goal". Id. at 761.

As described in Kusper v. Pontikes, 414 U.S. 51, 59-60 (1973), a decision which distinguished Rosario:

> "It is true, of course, that the Court found no constitutional infirmity in the New York delayed-enrollment statute under review in Rosario. That law required a voter to enroll in the party of his choice at least 30 days before a general election in order to be eligible to vote in the next party primary, ... It is also true that the Court recognized in Rosario that a State may have a legitimate interest in seeking to curtail raiding, since that practice may affect the integrity of the electoral process. 410 U.S., at 761." (ftn. omitted)

The validity of § 186 does not depend on whether the person it affects actually is a "party-raider". There was no claim in Rosario that previously unaffiliated voters were actually "raiding" the Democratic Party. Conceptually the plaintiff herein, who was previously unaffiliated, presents the same situation. He sought to enroll at a time not allowed by state law.

Despite the above clear holding, the decision below relied on Rosario, id. at 759, ftn. 9* to take the opportunity to reach an opposite conclusion. Thus from the start of the opinion below (4A), it was assumed § 186 was a durational residence requirement. It takes no lengthy analysis to show that § 186 is not such and, as a consequence, Dunn v. Blumstein, supra, has no application. In Dunn, the recent arrived resident absolutely could not register to vote, although everyone else could, up to 30 days before an election or a primary. Undoubtedly Dunn involved classification based on length of residence. However, in New York, plaintiff, when he came to New York, was in the same position as any other citizen who had failed to enroll before the preceding general election, regardless of length of residence. Thus, in New

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* Ftn. 9 said that a claim that § 186 was a durational residency requirement, unconstitutional under Dunn v. Blumstein, 405 U.S. 330 (1972) could not be raised by petitioners who made no claim they were recently arrived residents.

York, if § 186 applies, all citizens receive equal treatment as to the time party enrollment must be effected.

The plaintiff argued for, and the District Court accorded, greater rights than the average elector subject to § 186. Simply because plaintiff had come to New York after the preceding general election he was possessed of greater rights. This is unequal protection of the laws. This never was the meaning of the Fourteenth Amendment to the United States Constitution. There simply is no classification in Election Law § 186 based on length of residence.

Contrary to the opinion below, the challenged requirement is a "delayed-enrollment" statute, Rosario v. Rockefeller, supra; Kusper v. Pontikes, supra, at 59; it is not a durational residence requirement, opinion below, 5A.

POINT II

THE OPINION BELOW SUBSTITUTED ITS JUDGMENT FOR THAT OF THE LEGISLATURE.

By finding that there was "no substantial risk that a voter from another state or territory, will, at considerable effort, expense and personal dislocation, become a bona fide resident of New York for the purpose of 'raiding' a primary", (5A) the District Court was substituting its judgment for that of the Legislature.

In this specific area, regulation of the electoral process, the State need not use the least drastic means necessary to achieve the legitimate goal. Cf. Shelton v. Tucker, 364 U.S. 479, 488 (1960). On the contrary, according to Rosario, the time limitation is justified, id. at 760. It "is not an arbitrary time limit unconnected to any important state goal", id. at 760.

As was said in Neale v. Hayduk, 35 N Y 2d 182, 187, 316 N.E. 2d 861, 359 N.Y.S. 2d 542 (1974), app. pending ___ U.S. ___ (Dec. 9, 1974) decided the same day as the opinion below, and adhered to by the three-judge District Court in Ortner v. Board of Elections (74 Civ. 3416, S.D.N.Y., September 9, 1974), annexed hereto:

> "On the contrary, the regulatory device chosen need be satisfied only by a test of reasonableness so long as the overall limitation satisfies the compelling state interest."

and

> "Rosario has specifically upheld our time limitations on enrollment and we fail to understand why the Legislature may not distinguish between voters moving from county to county from those moving within a county -- or the City of New York even though the city, as a unique political sub division, happens to encompass several counties. This is a legitimate distinction drawn to achieve demonstrably reasonable ends."

What the opinion below failed to consider was that the previously unaffiliated voter, from within or without the State, constitutes a large group which can be organized to "raid" a party. There is a legitimate end in preserving party integrity by closing enrollment 8 to 11 months before the primary.

POINT III

ONLY ELECTION LAW § 187 IS INVOLVED AND IT IS CONSTITUTIONAL.

In presenting the claim that, as an newly-arrived out-of-stater, plaintiff was deprived of his constitutional rights, the question really revolves around Election Law § 187. This provides several exceptions to § 186. Asencio would have been entitled to a special enrollment, valid for the September, 1974 primary, by § 187, subd. 2(c) but for the limitation of subd. 6 ("...special enrollment is restricted to the same county the voter resided in at the preceding year."). Thus Asencio, as did the petitioners in Neale, should have been held to be challenging § 187(6). The opinion below totally ignores § 187. However as Neale notes, id. at 188:

> "We note that in Matter of Jordan v. Meisser (29 N Y 2d 661, app. dismd. 405 U.S. 907) this court unanimously upheld the validity of subdivision 6 of section 187 over petitioner's argument that he was denied equal protection.

> He had moved to Nassau County from Georgia and filed a valid designating petition. He was kept off the ballot, however, because subdivision 6 forced him to observe the time delay provisions of section 186. We see no factual distinction in the instant case warranting our departure from this very recent position taken on the same statute."*

The action of the Supreme Court in dismissing the appeal for "want of substantial federal question" in Jordan, 405 U.S. 967 is a decision on the merits, binding on this Court. It is the substantive equivalent of affirmance. Port Authority Bondholders Protective Committee v. Port of New York Authority, 387 F. 2d 259, 262 (2nd Cir. 1967).

As we have noted, Ortner v. Board of Elections, supra, adopted Neale. There was a dissent in Ortner, but as we have noted, it was by Judge Owen, the judge who authored the opinion below.

The instant case even lacks the Neale argument that the petitioner was continuing a preexisting political affiliation. The appellee Asencio makes no claim he was a Democrat in Puerto Rico. We would have the Court take judicial notice that the political system in Puerto Rico is independent of our two recognized major parties. Asencio was seeking an entirely new political affiliation in New York State.

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* Even the dissent in Neale, 35 N Y 2d at 192, accepted Jordan.

It seems quite clear that the above definitive decisions, Jordan v. Meisser, Neale v. Hayduk, Ortner v. Board of Elections, supra, have all upheld Election Law § 187. Only the opinion in the instant case has, sub silentio, erroneously questioned its constitutionality by declaring § 186 unconstitutional.

CONCLUSION

THE JUDGMENT BELOW SHOULD BE REVERSED.

Dated: New York, New York
January 22, 1975

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant-
Appellees Wilson and Lomenzo

SAMUEL A. HIRSHOWITZ
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Assistant Attorney General
of Counsel

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JANE ORTNER and CHARLES B. ORTNER,

Plaintiffs,

vs. 74 Civ. 3416

THE BOARD OF ELECTIONS OF THE COUNTY OF WESTCHESTER, NEW YORK, et al.,

Defendants.

Before:

HON. HAROLD R. MEDINA, CAJ
HON. WILLIAM C. CONNER, DJ
HON. RICHARD OWEN, D.J.

New York, September 9, 1974
Room 129 - 10:05 a.m.

APPEARANCES:

CHARLES B. ORTNER, Esq.,
Pro se.

LOUIS J. LEFKOWITZ, Esq.,
Attorney General for the State of New York,
By: A. Seth Greenwald, Esq.,
Assistant Attorney General

GERALD HARRIS, Esq.,
County Attorney,
By: Lawrence J. Glynn, Esq.,
Assistant County Attorney

JUDGE MEDINA: Now, gentlemen, we have decided the case. The following is the opinion of the Court concurred in by Judge Conner and, of course, me.

We are not called upon to decide whether Section 186 is a perfect statute, or whether in every case it allows every one who should be entitled to vote to do so.

Nor are we writing on a clean slate.

We must make a three-step determination -- and at every stop there are judicial precedents which guide us and, at least at two of the steps, control us.

Question 1 is whether there is a compelling state interest to be protected by Section 186. The United States Supreme Court, in Rosario v. Rockefeller, 410 U.S. 752, 761 (1973), ruled that "preservation of the integrity of the electoral process is a legitimate and valid state goal."

Question 2 is whether Section 186 reasonably protects that interest. In Rosario, the United States Supreme Court ruled that it did. 410 U.S. at 760-762.

Question 3 is whether Section 187, in providing specified exceptions in which late entrollment is permitted, unfairly discriminates between persons, such as plaintiffs, who move from one village or city to another in a

different county, and others who move across a county line without leaving the same village or city. In Neale v. Hayduk, decided September 4, 1974, the New York State Court of Appeals ruled that it did not.

For the reasons stated in the majority opinion in that case, we agree.

Judge Owen dissents and will now state the basis for his dissent.

JUDGE OWEN: I have made notes which will guide me to a more narrative-type of presentation.

I believe this to be a case involving voting rights and, therefore, any limitation upon those rights is to be viewed as being in a suspect category, and being in such acategory the Supreme Court, as I read it, has stated that the State of New York in this case must therefore justify the means that it has legislated to achieve a legitimate goal, which all three of us concur in is a legitimate goal. It has also been held by our Supreme Court that the means in such a situation should be the least means possible.

Acknowledging that raiding, which in all the various opinions, Neale, Rosario, and others, is the goal, in other words the protection against raiding, I do not believe that in this situation the means provided by Section 186 are necessary for the achievement of that

goal. I believe that where a person has moved the state is not justified in presuming him a raider and seeking to protect himself against him by a 9-to 11-month advance registration.

In Dunn the Tennessee law provided a 30-day cutoff period for registration to vote, and the Supreme Court held that that was an administrative determination that that was all the time that was needed. The same is true under Section 187, and I feel that New York need only 30 days to check out.

Therefore, given this view, it seems to me what we should be doing is to apply a test to see whether the state used the least means possible.

I do not believe that the test is to determine whether there was a rational basis for the legislature to have reached the statutory conclusion that it did.

In my opinion, Mr. Ortner should be permitted to vote.

I want to add I do not join with my brethren in their determination that Rosario binds us.

In Footnote No. 9 at Page 759 of 410 United States, the Supreme Court stated:

"The petitioners, however, lack standing to raise these contentions. They make no claim ... that

they have moved from one county to another."

In effect they are saying, "If that case were before us we might have a different situation on our hands."

In my judgment this case does not foreclose us from reaching that point as a case of first impression.

Given that, and for the reasons that were set forth in the opinion that I rendered earlier this month in Avrutick v. Wilson, 74 Civ. 1590 in this court, and for the reasons set forth as applicable in the dissent in Neale v. Hayduk in the Court of Appeals for the State of New York on September 4, 1974, I would permit Mr. Ortner and his wife to vote in tomorrow's election.

JUDGE MEDINA: Gentlemen, this has been an extremely interesting case. We have enjoyed the arguments on all sides. As judges often do, we wish we didn't have to decide for one party against another, but I am afraid that is one of the burdens that a judge must bear. Thank you very much.

(Time noted: 1:00 o'clock p.m.)